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AUTHOR Arnold, David W.; Thiemann, Alan J.
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ABSTRACT

This paper assesses the impact of the Americans with Disabilities Act (ADA) on preemployment psychological testing. The paper discusses rules and related guidelines of the Equal Employment Opportunity Commission (EEOC) and relevant case law under the Rehabilitation Act. EEOC rulings clarify the scope of what is intended to be included in the definition of mental impairment, indicating that the only limitation on the use of any preemployment psychological test is that the test may not disclose a mental or psychological disorder. The definitive resource on what constitutes a mental or psychological disorder is the "Diagnostic and Statistical Manual of Mental Disorders" (Third Edition, Revised). Tests or scales whose purpose is to disclose an impairment may only be used after a conditional offer of employment has been made. However, tests used to assess personality traits, behavior, attitudes, or propensity to act, when these are not symptoms of a mental disorder, may be used at the pre-offer stage. As commonly used psychological tests are not medical in nature and are not utilized to identify disabilities when used for employment screening, the specific time when such tests may be administered is not controlled by the ADA. (JDD)

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TO TEST OR NOT TO TEST: THE STATUS OF PSYCHOLOGICAL TESTING UNDER THE ADA

by

David W. Arnold, Esq. & Alan J. Thiemann, Esq.

The Americans with Disabilities Act ("ADA" or "Act") is probably the most significant piece of employment-related legislation to be enacted in recent years. In light of the breadth of the Act, employers have raised numerous questions regarding its scope and interpretation.

Among the inquiries being posed is whether the ADA affects the time at which preemployment psychological tests can be administered. Confusion regarding this issue stems from whether psychological tests are considered medical examinations under the ADA. The ADA provisions state that no medical examinations may take place at the pre-offer stage, but may be conducted only after a conditional offer of employment has been made to the job applicant See Section 102(c)(3) of the Act. Such a requirement is based on the propensity for medical examinations to reveal applicant disabilities.

This article will provide a discussion of the EEOC's final rules and related guidelines implementing the ADA, as well as relevant case law under the federal Rehabilitation Act. The article concludes that commonly used psychological tests are not medical in nature, nor are they utilized to identify disabilities when used for employment screening. Thus, the specific time when such tests may be administered is not controlled by the ADA.

The ADA covers all individuals residing in the United States who are disabled. The law defines a disabled person as one who: (a) has a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (b) has a record of such impairment; or (c) is regarded as having such an impairment. See Section 3(2) of the Act.

The key to any analysis of psychological testing under the ADA and the EEOC rules starts with the fundamental definition of impairment as:

> any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. See 29 CFR §1630.2(h).

The EEOC's own rulings clarify the scope of what is intended to be included in the definition of mental impairment. The guidelines expressly exclude common "personality" traits, such as poor judgment or quick temper, from the definition of impairment where

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they are not symptoms of a mental or psychological disorder.[1]

Needless to say, there are many personality traits which are not mental disabilities, beyond the few examples mentioned by the EEOC. Consequently, there is a broad set of traits which employers may legally inquire about at the preemployment stage. The only limitation on the use of any preemployment psychological test is that the test may not disclose a mental or psychological disorder.

The definitive resource on what constitutes a mental or psychological disorder is the Diagnostic and Statistical Manual of Mental Disorders (Third Edition, Revised) ("DSM-III-R"). Although Congress did not reference it in the law, its existence was well known and recognized. During an ADA debate, Senator Armstrong stated that a "private entity that wished to know what the Act might mean with respect to mental impairments would do well to turn to DSM-III-R . . .." In determining what constitutes a mental impairment under the Rehabilitation Act, the courts typically have been guided by the DSM-III-R, since it is considered the standard source and lists mental disorders by name along with characteristic symptom clusters. If the expert community does not consider something to be a "mental disorder", it is not likely to be considered an impairment under the ADA.

This position is fully consistent with the existing law under the Rehabilitation Act, which Congress explicitly told the EEOC it had to follow in adopting its final rules. Indeed, the language of the guideline is taken almost verbatim from one such case, Daley v.Koch, 51 FEP Cases 1077 (2d Cir. 1989). In that case, a candidate for the New York City Police Department was refused employment based on the results of tests including the California Psychological Inventory ("CPI") and the Minnesota Multiphasic Personality Inventory ("MMPI"), as well as a follow-up interview with the employer's psychologist. Based on that information, the New York Police Department concluded that the applicant had the personality traits of "poor judgment, irresponsible behavior and poor impulse control," which rendered him unsuitable to be a police officer. The applicant was not diagnosed as having any specific mental disorder.

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[1] This position is consistent with other language in the EEOC's final rules indicating that certain psychological criteria, ostensibly those relating to specific mental disorders, must be identified by means of post-offer examinations See 29 §1630.14(b). In order to avoid internal inconsistency within the rules, tests whose purpose, intent, or use is to detect the presence of specific disabling disorders, must be used on a post-offer basis.

The reasoning employed by the court in the Daley case suggests that what is at issue is not so much the specific test that is being used, but rather the purpose and use to which the test (or scale of the test) is being put. While there are tests whose purpose and use is to detect a mental impairment, they represent a small minority of the tests which are used in employment settings. The vast majority of tests used in employment settings are used to assess applicants with respect to qualities which are not even remotely similar to those contained in the definition of impairment.

To the extent that a test or scale has a purpose or use, which is to disclose an impairment, that test may only be used after a conditional offer of employment has been made. On the other hand, to the extent that a test or scale has a purpose or use which is to assess personality traits, behavior, attitudes or propensity to act, when these are not symptoms of a mental disorder, such a test may be used at the pre-offer stage.

Also noteworthy in the Daley case is the court's finding that the applicant was not impaired merely because he was determined to be incapable of holding one particular job. As the court expressly held:

> [f]or the same reason that the failure to qualify for a single job does not constitute a limitation on someone of a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the [person] as a handicapped individual.

See, also, Tudyman v. United Airlines, 608 F.Supp. 739(C.D. Cal. 1984).

Moreover, not even commonly recognized psychological disorders have been found in all cases to constitute disabilities under the law. Forsi v. Bowen, 794 F.2d 931(4th Cir. 1986). Specifically, the court held that acrophobia (fear of heights) did not interfere with the performance of an employee's major life activities and therefore was not covered under the Rehabilitation Act. Consequently, since the results of most psychological tests do not prevent the individual from obtaining employment in another field, with another employer in the same field, or even with the same employer in another field, it is impossible to conclude that the EEOC rules limit the use of all psychological testing to post-offer.[2]

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[2] Given that all testing instruments are less than perfect, the same test may yield slightly different results across time and/or situations. This is further compounded by different employers setting various levels for acceptable performance and

Although this is by no means a comprehensive discussion of the Americans with Disabilities Act, it is hoped that it clarifies the erroneous view that the timing of all preemployment psychological testing is impacted by the ADA on the mistaken basis that such testing identifies applicant disabilities. Preemployment psychological tests for "personality" traits are not usually medical in nature and thus, can continue to be used once the ADA becomes effective.

As with comparable state laws, the ADA is not designed to attack or unreasonably restrict the timing and use of preemployment psychological testing. Rather, the Act serves as a safeguard to ensure that employers are using only non-discriminatory and valid selection measures. By enacting the ADA, Congress sought to ensure that disabled individuals are fairly and accurately evaluated for employment -- goals that are consistent with the current use of essentially all preemployment psychological testing.

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utilizing different tests to assess applicants.

AUTHOR BIOS

Alan Thiemann is a partner in the law firm of Taylor Thiemann & Aitken, located in Alexandria, Virginia. Mr. Thiemann represents corporations and trade associations on regulatory and legislative issues, including employment and personnel matters. He holds a J.D. from the University of Texas Law School. Mr. Thiemann serves as Legislative Counsel for the Association of Personnel Test Publishers.

David Arnold has a Ph.D. in industrial psychology from the University of Nebraska and a J.D. from Loyola University Law School. Dr. Arnold serves as General Counsel and Vice President of Research for Reid Psychological Systems, as well as General Counsel for the Association of Personnel Test Publishers. With both organizations, Dr. Arnold's major focus is in the area of employment law.